

123 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

In re Otter Tail Power Company

Docket No. IN08-6-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued May 29, 2008)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Otter Tail Power Company (Otter Tail). This Order is in the public interest because it resolves alleged violations by Otter Tail of the Open Access Transmission and Energy Markets Tariff (OATT) of the Midwest Independent Transmission System Operator, Inc.(MISO). Otter Tail has agreed to disgorge \$546,832 in profits, plus interest.

Background

2. Otter Tail is an investor-owned utility and transmission-owning member of MISO. It is headquartered in Fergus Falls, Minnesota and provides electricity to residential, industrial, farm, commercial, and municipal customers over a 50,000 square mile area within Minnesota, North Dakota and South Dakota. Through a series of orders in 2001 and 2002, the Commission granted Otter Tail's request to transfer operational control of its 100 kV and greater transmission operations to MISO. This transfer resulted in MISO taking over from Otter Tail operational control of Otter Tail's transmission system and handling all transmission service requests utilizing Otter Tail's system. On April 1, 2005, MISO's Day 2 market became operational, and MISO took over the dispatch of its member utilities' generation. After that date, MISO's member utilities no longer scheduled transmission within MISO's footprint.

3. On September 27, 2005, the Division of Audits opened an audit of Otter Tail to determine, among other things, whether Otter Tail's transmission practices were in compliance with the Commission's rules, regulations and tariff requirements from January 1, 2003 through March 31, 2005 (the study period). As a result of that audit, a

preliminary investigation was opened pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2007).

4. As a result of this investigation, staff identified two tariff violations by Otter Tail: (1) the improper use of network service to import energy that was used to facilitate off-system sales, and (2) the improper use of transmission service that provided a superior curtailment priority than appropriate in certain instances.

Use of Network Service to Facilitate Off System Sales

5. Section 28.6 of MISO's OATT states as follows:

The Network Customer shall not use Network Integration Transmission Service for (i) sales of capacity and energy to non-designated Loads, or (ii) direct or indirect provision of Transmission Service by the Network Customer to third parties. All Network Customers taking Network Integration Transmission Service shall use Point-To-Point Transmission Service under Module B of this Tariff for any Third-Party Sale which requires use of the Transmission Provider's Transmission System except for service where the purchaser is a Network Customer of the Transmission Provider.¹

6. Enforcement determined that during the study period Otter Tail used network transmission service under MISO's OATT to import power that later was sold off-system. Enforcement determined that portions of these purchases were made to service the off-system sales, and thus violated section 28.6 of MISO's OATT. Taking into account only those purchases made from non-MISO members, staff determined that Otter Tail improperly utilized network transmission service for this purpose in 3,306 operating hours, representing approximately 250,000 MWh of purchased energy. Enforcement calculated that Otter Tail received \$546,832 in profits from the resultant off-system sales. These profits arose from the difference in the purchase and sale prices of transactions scheduled into and out of Otter Tail's control area. The purchases were ultimately sold off-system and the sales were not from Otter Tail-owned generation.

7. Enforcement also calculated the foregone point-to-point transmission revenues which Otter Tail's wholesale merchant function should have paid to MISO, in its role as transmission provider, for these purchases. However, Enforcement did not seek

¹ Midwest ISO FERC Electric Tariff, Second Revised Volume No. 1, section 28.6, effective Dec. 23, 2002 (section 28.6). (At all times during the audit period, this tariff section remained unchanged, and is identical to the current tariff section 28.6.)

reimbursement for these revenues, inasmuch as MISO would be required under its contractual and tariff obligations to pay the bulk of it back to Otter Tail.

Curtailment Priority

8. Section 28.4 of MISO's OATT states as follows:

The Network Customer may use the Transmission System to deliver energy to its Network Loads from resources that have not been designated as Network Resources. Such energy shall be transmitted, on an as-available basis, with no additional charges imposed under Schedules 7, 8, or 9, or the applicable ITC Rate Schedule. Deliveries from resources other than Network Resources will have a higher priority than any Non-Firm Point-To-Point Transmission Service under Part II of the Tariff or under any applicable ITC Rate Schedule.²

9. Section 28.4 of MISO's OATT provides that if a network customer imports energy from a non-designated network resource to serve its network loads, it may use network service, but at a lower curtailment priority than for firm transmission service. Enforcement determined that on some occasions Otter Tail scheduled delivery of energy from non-designated resources using the curtailment priority for firm transmission service (7F or 7FN) associated with designated resources, instead of secondary network service (6NN), in violation of section 28.4 of MISO's OATT.

10. Enforcement identified over 64 days during which Otter Tail scheduled delivery of 10,882 MWhs of energy from off-system non-designated short-term purchases, improperly using firm network transmission service instead of secondary network service. However, the advantage this gave Otter Tail is not readily quantifiable, and Enforcement therefore did not seek reimbursement for this violation.

Stipulation and Consent Agreement

11. Enforcement and Otter Tail have entered into the attached Agreement to resolve Enforcement's allegations of Otter Tail's transmission scheduling violations. The Agreement requires Otter Tail to disgorge \$546,832 plus interest, with payment made to the Low Income Home Energy Assistance Program (LIHEAP) administered by the three states in which Otter Tail serves (Minnesota, North Dakota, and South Dakota). This disbursement was chosen because, due to Otter Tail's membership in MISO, it was not

² MISO Tariff, Second Revised Volume No. 1, section 28.4, effective Dec. 23, 2002 (section 28.4).

possible to identify the wholesale customers who used Otter Tail's transmission system during the study period.

12. Enforcement staff did not seek imposition of a compliance monitoring plan on Otter Tail because after MISO's Day 2 market became operational, MISO's member utilities no longer schedule transmission within the MISO footprint.

13. We conclude that the payment plus interest specified in the Agreement provides a fair and equitable resolution of this matter and is in the public interest.

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Otter Tail Power Company)	
)	Docket No. IN08-6-000
)	

STIPULATION AND CONSENT AGREEMENT

The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and Otter Tail Power Company (Otter Tail) enter into this Stipulation and Consent Agreement (Agreement) to resolve a preliminary, non-public investigation pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2007), into certain transmission scheduling practices of Otter Tail.

I. STIPULATION

For the purposes of resolving between Enforcement and Otter Tail the matters discussed herein, Enforcement and Otter Tail hereby stipulate and agree to the following:

A. Background

1. Otter Tail is an investor-owned utility and transmission-owning member of the Midwest Independent Transmission System Operator, Inc. (MISO). It is headquartered in Fergus Falls, Minnesota and provides electricity to residential, industrial, farm, commercial, and municipal customers over a 50,000 square mile area within Minnesota, North Dakota and South Dakota. Through a series of orders in 2001 and 2002, the Commission granted Otter Tail's request to transfer operational control of its 100 kV and greater transmission operations to MISO. This transfer resulted in MISO taking over from Otter Tail operational control of Otter Tail's transmission system and handling all transmission service requests utilizing the Otter Tail transmission system.

2. Pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2007), Enforcement opened a preliminary, non-public investigation to determine whether Otter Tail's transmission scheduling practices were in compliance with the Commission's rules, regulations and tariff requirements, and specifically with MISO's Open Access Transmission and Energy Markets Tariff (OATT). This investigation originated from an audit into Otter Tail's transmission scheduling practices and other matters, which was opened on September 27, 2005.

3. Enforcement staff examined whether Otter Tail, during the period January 1, 2003 through March 31, 2005 (the study period), violated (i) section 28.6 of MISO's OATT by improperly using network transmission service to bring onto its system energy used to service off-system sales, and (ii) section 28.4 of MISO's OATT by improperly using transmission service with a curtailment priority reserved for purchases from designated network resources for the purpose of making purchases from non-designated network resources.

4. On April 1, 2005, MISO's Day 2 market became operational, MISO took over the dispatch of its member utilities' generation, and its member utilities no longer schedule transmission within the MISO footprint.

B. Use of Network Service to Facilitate Off System Sales

5. During the study period, Otter Tail used network transmission service under MISO's OATT to import power that later was sold off-system. Enforcement determined that portions of these purchases were made to service the off-system sales, and thus violated section 28.6 of MISO's OATT. Taking into account only those purchases made from non-MISO members, staff determined that Otter Tail improperly utilized network service for this purpose in 3,306 operating hours, representing approximately 250,000 MWh of purchased energy. Enforcement calculated that Otter Tail received \$546,832 in profits from the resultant off-system sales. These profits arose from the difference in the purchase and sale prices of transactions scheduled into and out of Otter Tail's control area. The purchases were ultimately sold off-system and the sales were not from Otter Tail-owned generation.

6. Enforcement also calculated the foregone point-to-point transmission revenues which Otter Tail's wholesale merchant function should have paid to MISO, in its role as transmission provider, for these purchases. During the study period, peak firm point-to-point charges were \$63.91 per MW-day, and off-peak firm point-to-point charges were \$45.65 per MW-day. Otter Tail used approximately 5,900 MW-days of on-peak and 5,000 MW-days of off-peak hours of transmission service for the purchases in question. Based on these amounts, the foregone point-to-point payments that Otter Tail should have made to MISO during the study period totaled \$608,241. However, Enforcement does not seek reimbursement for this amount, inasmuch as MISO would be required under its contractual and tariff obligations to pay the bulk of it back to Otter Tail.

C. Curtailment Priority

7. Section 28.4 of MISO's OATT provides that if a network customer imports energy from a non-designated network resource to serve its network loads, it may use network service, but at a lower curtailment priority than for firm transmission service.

Enforcement determined that on some occasions Otter Tail scheduled delivery of energy from non-designated resources using firm transmission service (7F or 7FN) associated with designated resources, instead of secondary network service (6NN), in violation of section 28.4 of MISO's OATT.

8. Enforcement identified over 64 days during which Otter Tail scheduled delivery of 10,882 MWhs of energy from off-system non-designated short-term purchases, improperly using firm network transmission service instead of secondary network service. However, the advantage this gave Otter Tail is not readily quantifiable, and Enforcement therefore does not seek reimbursement for this violation.

D. Resolution of Enforcement's Determinations

9. Otter Tail agrees that it committed the acts in question, but neither admits nor denies that they constitute tariff violations. Nonetheless, in view of the costs and risks of litigation, and in the interest of resolving any dispute between Enforcement and itself regarding the acts in question, Otter Tail agrees to undertake the payment obligations set forth in this Agreement.

10. Otter Tail further states that it has been unable to replicate the reimbursement calculations made by Enforcement, but accepts the calculations as accurate for purposes of this Agreement. It further states that the energy purchases cited by Enforcement as improperly using network transmission service came into and out of Otter Tail's control area and did not involve sales from Otter Tail's own generation.

11. Otter Tail consents to the use of Enforcement's determinations and conclusions set forth in this Agreement for the purpose of assessing the factors, including the factor of determining the company's history of violations, that are set forth in the October 20, 2005 Policy Statement on Enforcement,³ or that may be set forth in any successor policy statement or order. Such use may be in any other proceeding before the Commission or to which the Commission is a party; provided however that Otter Tail does not consent to the use of the specific acts set forth in this Agreement as the sole basis for any other proceeding brought by the Commission, nor does Otter Tail consent to the use of this Agreement by any other party in any other proceeding.

II. REMEDY AND SANCTION

12. For purposes of settling any and all civil and administrative disputes, and in lieu of any other remedy that the Commission might assess, determine, initiate, or pursue, concerning any of the matters described in Section I above, Enforcement and Otter Tail

³ *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (2005).

agree that on and after the Effective Date of this Agreement, Otter Tail shall take the following actions:

13. Within ten days after the Effective Date of this Agreement, Otter Tail shall pay a total of \$546,832, plus interest calculated as described below, to the Low Income Home Energy Assistance Program (LIHEAP) administered by the three states in which Otter Tail serves (Minnesota, North Dakota, and South Dakota). Payment shall be made in proportion to each state's allocation percentages and shall be made to each state's LIHEAP program within ten days from the Effective Date of this Agreement. Specifically, 51% of the total amount shall be disbursed to the Minnesota LIHEAP, 40% shall be disbursed to the North Dakota LIHEAP, and 9% shall be disbursed to the South Dakota LIHEAP. This disbursement to such energy assistance programs is being made because there is no satisfactory method for accurately identifying individual entities that may have been harmed by Otter Tail's use of network service to facilitate off-system sales. This disbursement shall be in addition to any contributions to LIHEAP or other energy assistance programs which Otter Tail may have regulatory or contractual obligations to make.

14. Interest on the principal amount shall be calculated from the date Otter Tail received the profits to be paid through the date of such payment, at the annual Federal Reserve Board prime rate, compounded quarterly. The compounded amount of principal plus interest from the date Otter Tail received the profits to be paid through December 31, 2007 is \$665,546. Interest on this amount from December 31, 2007 through the date of payment shall be calculated based on the Federal Reserve Board's current prime rate of 7.6 percent per annum, compounded quarterly.

15. Within 30 days after the Effective Date of this Agreement, Otter Tail shall submit to the Commission proof of payment of the foregoing amount of principal and interest.

16. Since MISO's member utilities no longer schedule transmission within the MISO footprint, Enforcement does not require any remedial procedures for Otter Tail.

III. ADDITIONAL TERMS

17. The "Effective Date" of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. When effective, this Agreement shall resolve the matters specifically addressed herein as to Otter Tail and any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to Otter Tail.

18. Commission approval of this Agreement without material modification shall release Otter Tail and any affiliated entity, its agents, officers, directors and

employees, both past and present, and any successor in interest to Otter Tail, and shall forever bar the Commission from holding Otter Tail liable for any and all administrative or civil claims arising out of, related to, or connected with the transmission scheduling violations addressed in this Agreement.

19. Failure to make the payment set forth above at the time and in the manner specified in this Agreement, or to comply with any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.*, and may subject Otter Tail to additional action under the enforcement and penalty provisions of the FPA.

20. If Otter Tail does not make the payment set forth above at the time agreed by the parties, interest as calculated above will continue to accrue, in addition to any penalties which may be imposed for violation of this Agreement.

21. The Agreement binds Otter Tail and its agents, successors, and assigns. The Agreement does not create any additional or independent obligations on Otter Tail or any affiliated entity, or on its agents, officers, directors, or employees, other than the obligations identified in Section II of this Agreement.

22. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, employee, officer, director, agent or representative of Enforcement or Otter Tail has been made to induce the signatories or any other party to enter into the Agreement.

23. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor Otter Tail shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and Otter Tail.

24. Otter Tail agrees that the Commission's order approving the Agreement without material modification shall be a final and an unappealable order. Otter Tail waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.


25. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity and accepts the Agreement on the entity's behalf.

26. The undersigned representative of Otter Tail affirms that he has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his knowledge, information and belief, and that he understands that the Agreement is entered into by Enforcement in express reliance on those representations.

27. The Agreement may be signed in counterparts.

28. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

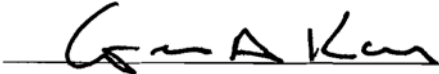
Agreed to and accepted:



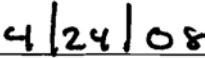
Susan J. Court
Director
Office of Enforcement
Federal Energy Regulatory Commission



Date



George A. Koeck
General Counsel
Otter Tail Corporation



Date